(9) (P)

No. 84-1555 and No. 84-1567

Supreme Court, U.S.
FILED
JUL 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

CORRECTED COPY

WOODWARD SAND CO., INC.,
Appellant,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANTS CONNOLLY, ET AL.

WAYNE JETT*
JETT, CLIFFORD & LAQUER
3055 Wilshire Boulevard
Suite 420
Los Angeles, California 90010
(213) 380-2082
Counsel for Appellants Connolly, et al.
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

BEST AVAILABLE COPY

62 pp

QUESTIONS PRESENTED

1. By requiring payments of "withdrawal liability" to a multiemployer pension trust from an employer who has no further contractual obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980 [29 U.S.C. § 1381(a), *et seq.*] "take property" within the meaning of the Taking Clause of the Fifth Amendment of the Constitution?

2. If § 1381(a) takes property from the employer, is the property taken for a "private use" in violation of the Taking Clause?

3. If § 1381(a) takes property for a public use, is the property taken without "just compensation" in violation of the Taking Clause?

4. If the provisions of § 1381(a) imposing withdrawal liability are void under the Taking Clause, are the provisions of 29 U.S.C. §§ 1306-1307 requiring payment of "premiums" by multiemployer pension trusts to PBGC invalid as inseverable from § 1381(a)?

5. Are multiemployer pension trusts excused from paying "premiums" to PBGC under Title IV of ERISA as enacted in 1974 [29 U.S.C. §§ 1307-1381(c)(2); 88 Stat. 1013-1035] because the statute violates the Separation of Powers principle of the Constitution by delegating legislative discretion to determine the use of funds collected?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	xi
JURISDICTION	xii
CONSTITUTIONAL AND STATUTORY PROVISIONS	xiii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I	
THE WITHDRAWAL LIABILITY STATUTE TAKES PRIVATE PROPERTY FROM ONE PERSON AND TRANSFERS OWNERSHIP TO ANOTHER FOR PRIVATE USE, WITHOUT PROVIDING JUST COMPENSATION	10
A. The Framers Of The Constitution Intended To Prohibit Action By The Federal Government Transferring Private Wealth From One Person To Another	10
B. The "Withdrawal Liability" Statute Effects A Taking Of Property	14
(1) The Character Of The Governmental Action	15
(2) The Economic Impact Of The Governmental Action	21
(3) Interference With Reasonable Investment-backed Expectations	22
(a) Regulation of Collective Bargaining Agreements	23
(b) Regulation of Retirement Plans	25
(c) The General Perspective of Expectations	29
C. The Statute Takes Property For Private Use	30

TABLE OF CONTENTS

Page

D. The Statute Provides No Compensation For The Property Taken From The Withdrawn Employer 33

E. Protection Of Rights In Private Property Is Essential To The Preservation Of Liberty And The Functioning Of A Liberal Republic 34

II

IF "WITHDRAWAL LIABILITY" IS INVALID UNDER THE TAKING CLAUSE, THE RELATED PROVISIONS OF THE MPPAA REQUIRING PAYMENT OF "PREMIUMS" TO PBGC ARE LIKEWISE INVALID AS INSEVERABLE FROM THE STRICKEN STATUTORY SCHEME 38

III

THE "PREMIUM" STATUTE ENACTED IN 1974 VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING LEGISLATIVE AUTHORITY TO PBGC 40

CONCLUSION 43

TABLE OF AUTHORITIES

Cases

	Page
Allied Structural Steel v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978)	19
Allied Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S.Ct. 383 (1971)	16
Armstrong v. U.S., 364 U.S. 40, 80 S.Ct. 1563 (1961)	18
Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954)	31
Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941)	35
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 40 S.Ct. 183 (1920)	16
Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976)	40
Calden v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)	13
Connolly v. PBGC, 581 F.2d 729 (9th Cir. 1978)	29
Hampton & Co. v. U.S., 276 U.S. 344, 48 S.Ct. 348 (1928)	9, 42
Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 104 S.Ct. 2321 (1984)	20, 31, 32, 33
H.K. Porter Co. v. N.L.R.B., 397 U.S. 99, 90 S.Ct. 821 (1970)	24
I.N.S. v. Chadha, ___ U.S. ___, 103 S.Ct. 2764 (1983)	9, 39, 40, 42
Kaiser Aetna v. U.S., 444 U.S. 164, 100 S.Ct. 383 (1979)	22
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854 (1935)	18
Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113 (1972)	34, 35
N.L.R.B. v. Amax Coal Co., 453 U.S. 322, 101 S.Ct. 2789 (1981)	6, 17, 28
N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 72 S.Ct. 824 (1952)	24

Table of Authorities

Cases

Page

N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 92 S.Ct. 1571 (1972) 7, 23

N.L.R.B. v. Insurance Agents, 361 U.S. 477, 80 S.Ct. 419 (1960) 24

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937) 23

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978) 21

PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980) 20, 21

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980) 20, 35

Ruckelshaus v. Monsanto Co., ____ U.S. ____, 104 S.Ct. 2862 (1984) 6, 9, 15, 31, 33

Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820 (1969) 21

Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912 (1957) 23, 24

U.S. v. Darby, 312 U.S. 100, 61 S.Ct. 451 (1941) .. 15

U.S. v. Locke, ____ U.S. ____, 105 S.Ct. 1785 (1985) 17

U.S. v. Security Industrial Bank, ____ U.S. ____, 103 S.Ct. 407 (1982) 18

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446 (1980) 22

Constitution

United States Constitution, First Amendment 35

United States Constitution, Fifth Amendment ..... i, xiii, 3, 5, 10, 13, 14, 30, 35, 43

TABLE OF AUTHORITIES

Statutes

	Page
Employee Retirement Income Security Act of 1974	
Sec. 509 (88 Stat. 895, 29 U.S.C. § 1139)	39
Sec. 4006 (29 U.S.C. § 1306)	43
Sec. 4006(a)(3)(A)(ii) (94 Stat. 1264-65, 29 U.S.C. § 1306(a)(3)(A)(ii))	38, 43
Sec. 4007 (29 U.S.C. § 1307)	43
Sec. 4062(b)(2) (88 Stat. 1029, 29 U.S.C. § 1362(b)(2))	26
Sec. 4064 (88 Stat. 1031, 29 U.S.C. § 1364)	25
Sec. 4082(c) (29 U.S.C. §1381(c))	43
Sec. 4082(c)(2) (88 Stat. 1035, 28 U.S.C., §1381(c)(2))	41
Internal Revenue Code	
Sec. 401(a) (26 U.S.C. § 401(a))	27
Reg. § 1.401-1(b)(1)(i)	27
Labor-Management Relations Act of 1947	
Sec. 301 (29 U.S.C. § 185)	23, 24
Sec. 302(c)(5) (29 U.S.C. § 186(c)(5))	1, 17
National Labor Relations Act	
Sec. 8(b)(1)(B) (29 U.S.C. § 158(b)(1)(B))	28
Sec. 8(d) (29 U.S.C. § 158(d))	23
Public Law 95-214, Sec. 1, (Dec. 19, 1977, 91 Stat. 1501)	38, 41
Judicial Code	
28 U.S.C. § 1253	xii
28 U.S.C. § 1491	33

TABLE OF AUTHORITIES

STATUTES

	Page
28 U.S.C. § 2101(b)	xii
28 U.S.C. § 2201	xii
28 U.S.C. § 2282	xii
Labor Code	
29 U.S.C. §§ 1301-1381 (88 Stat. 1003-1035)	xii
29 U.S.C. § 1303(f)	xii
29 U.S.C. §§ 1306-1307	i, xiii, 43
29 U.S.C. § 1306(a)(3)(A) (94 Stat. 1264-65)	xvi, xvii
29 U.S.C. §§ 1307-1381(c)(2) (88 Stat. 1013-1035)	i
29 U.S.C. § 1307 (88 Stat. 1013; 94 Stat. 1300)	xvii
29 U.S.C. §§ 1381-1405 (94 Stat. 1217-1243)	xiii, 39, 43
29 U.S.C. § 1381(a) (94 Stat. 1217)	i, xiii xiv, 6, 15
29 U.S.C. § 1382 (94 Stat. 1218)	xiv, 21
29 U.S.C. § 1383 (94 Stat. 1218, 1220)	xiv, xv
29 U.S.C. § 1385(a) (94 Stat. 1221)	xvi
29 U.S.C. § 1399(b)(1)	21
29 U.S.C. § 1401(d)	21
29 U.S.C. § 1405	22
29 U.S.C. § 1461(c)(2) (formerly 29 U.S.C., § 1381(c)(2); 88 Stat. 1034; 94 Stat. 1267)	xiii, xvii, 42

Textbooks and Treatises

1 *Annals of Congress*, p. 434 (J. Gales ed. 1789)	13
Coyne, Thomas J., *"Hawaii Housing Authority v. Midkiff: A Final Requiem For The Public Use Limitation of Eminent Domain?"*, 60 Notre Dame L. Rev., pp. 388, 393-97	31

TABLE OF AUTHORITIES

TEXTBOOKS AND TREATISES

Page

Freund, P., *The Supreme Court in the United States*, p. 35 (1961) 14

John XXIII, *Mater et Magistra*, pp. 18, 109 36

Kirkland, L., *Pension Plans Under Collective Bargaining — A Reference Guide For Trade Unions*, Department of Social Security of AFL-CIO, pp. 58-62 (1954) 28

Locke, J., *An Essay Concerning Civil Government*, in J. Locke, *Two Treatises of Government*, pp. 378-80 (P. Laslett ed. 1960) 14

Melone, J.J., *Collectively Bargained Multi-employer Pension Plans*, p. 19 (1963) 26

Mill, John Stuart, *Principles of Political Economy*, pp. 203-04 (Sir William Ashley ed. 1909) (reprinted in 1969, New York: Augustus M. Kelley) 22

Novak, M., *The Spirit of Democratic Capitalism*, pp. 15-16, 83-84, 153, 202-205, 210, 244, 273-285, 304-307, 325-26, 357 (Simon & Shuster, 1982) ...35, 36, 38

Schwartz, B., *A Commentary on the Constitution of the United States: Part II, The Right of Property*, pp. 18-22 (1965), and *Part III, The Rights of the Person*, p. 8 (1968) 14

Special Project, The Private Use of Public Power: The Private University and the Power of Eminent Domain, 27 Vand. L. Rev., pp. 681, 682-83 (1974) 14

Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev., pp. 553, 585, 586, 587-88, 595 (1972) 13, 14, 20

The Federalist No. 10, pp. 104-09 (J. Madison) (Hamilton ed. 1868) 12, 13

TABLE OF AUTHORITIES

TEXTBOOKS AND TREATISES

Page

The Federalist No. 54, p. 370 (J. Cooke ed. 1961) . 14

The Federalist No. 78, p. 399 (A. Hamilton) (London: J. M. Dent & Sons Ltd. 1911) 37

2 *The Records of the Federal Convention of 1787*, 203-04 (M. Farrand ed. 1911) 11

5 *The Writings of James Madison*, pp. 29, 271-75, 319-21, G. Hunt ed. (New York: Putnam 1900-1910) 11, 13, 30

Miscellaneous

Glossary — Correspondent Course On Pension Plans, Office of Labor-Management and Welfare Pension Reports, U.S. Department of Labor, October, 1969 27

House Conference Report No. 93-1280 (Aug. 12, 1974) 41

3 Legislative History of ERISA, pp. 4251, 4678 (1976) 29, 41

Senate Bill 1179 40

Senate Report No. 105, 80th Cong., 1st Sess., p. 16 24

Senate Report No. 573, 74th Cong., 1st Sess., p. 12 23

Senate Report No. 93-383 41

1974 U.S. Code Cong. & Admin. News, p. 4965 ... 40, 41

No. 84-1555 and No. 84-1567

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANTS CONNOLLY, ET AL.

John L. Connolly, *et al.*,[1] appellants ("the Trustees"), appeal from the Judgment of the Three Judge Court convened in the United States District Court for the

[1]All parties to the proceeding in the district court are listed in the Jurisdictional Statement filed by the Trustees (JS, p. 1, n. 1).

Central District of California entered December 4, 1984, holding that certain federal statutes are constitutional and denying a permanent injunction against enforcement of such statutes.

OPINIONS BELOW

The Order Granting Summary Judgment To Defendant filed by the Three Judge Court of the U.S. District Court for the Central District of California on May 1, 1984, appears in the Joint Appendix and is not officially reported.[2] JA 104-118. The Order Granting Summary Judgment to plaintiffs filed by the district court on February 12, 1976, is reported at 419 F.Supp. 737. JA 42-52. The opinion of the U.S. Court of Appeals for the Ninth Circuit reversing summary judgment for plaintiffs and remanding is reported at 581 F.2d 729 (1978) (see JS *App.* 30). This Court denied plaintiffs' petition for a writ of certiorari as reported at 440 U.S. 935 (1979). The Order Re Three Judge Court filed by the district court on September 13, 1979, is not officially reported. JA 55-56. The order of the Ninth Circuit summarily denying a petition for writ of mandamus filed by the Trustees seeking review of the Order Re Three Judge Court is not officially reported (see JS *App.* 27). The order of this Court similarly denying plaintiffs' petition for writ of mandamus is reported at 445 U.S. 959 (1980) (see JS *App.* 26). The opinion of the Ninth Circuit reversing and remanding to the district court with directions to convene a Three Judge Court is reported at 673 F.2d 110 (1982) (see JS *App.* 17). The Judgment entered by the Three Judge

---

[2]"JA" refers to the Joint Appendix followed by page number(s). "JS" and "JS *App.*" refer to the Jurisdictional Statement filed by the Trustees, and the Appendix thereto, respectively. "R." refers to the Record on Appeal, followed by the assigned docket number and page(s) of relevant document.

Court on December 4, 1984, is set forth in the Joint Appendix. JA 119-121.

JURISDICTION

The Trustees filed this action June 17, 1975, pursuant to 29 U.S.C. § 1303(f) to recover amounts paid as "premiums" to appellee Pension Benefit Guaranty Corporation ("PBGC") and for a declaratory judgment pursuant to 28 U.S.C. § 2201 holding the pension plan ("Plan") administered by the Trustees to be a "defined contribution plan" outside the jurisdiction of PBGC. JA 1 *et seq.* Alternatively, if the foregoing relief were denied, the action sought a determination that Title IV of ERISA [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] was unconstitutional and a permanent injunction restraining PBGC from enforcing the statute with respect to the Plan. The constitutional issues and the availability of injunctive relief were required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2282.

The judgment of the Three Judge Court denying a permanent injunction against enforcement of the federal statute in this action was entered on December 4, 1984. JA 119-121. On December 17, 1984, PBGC filed a motion to alter or amend the judgment in respects which are of no import to the matters to be dealt with on this appeal. The Trustees filed a notice of appeal to this Court in the district court on January 31, 1985, within the time permitted by 28 U.S.C. § 2101(b).

This Court has jurisdiction under 28 U.S.C. § 1253 to determine this appeal from the final judgment denying a permanent injunction in a civil action required to be heard and determined by a district court of three judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> "[N]or shall private property be taken for public use, without just compensation."

The challenged federal statutes are contained in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and in the amendments of ERISA enacted by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The challenged statutes in their entirety are comprised of 29 U.S.C. §§ 1381-1405, §§ 1306-1307 and § 1461(c)(2) [formerly § 1381(c)(2)]. The essential statutory provisions are as follows:

29 U.S.C. § 1381(a) [94 Stat. 1217]:

> "(a) If an employer withdraws from a multi-employer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> "(b) For purposes of subsection (a) —
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted —
>
> (A) first, by any de minimis reduction applicable under section 1389 of this title,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term 'complete withdrawal' means a complete withdrawal described in section 1383 of this title.

(3) The term 'partial withdrawal' means a partial withdrawal described in section 1385 of this title."

29 U.S.C. § 1382 [94 Stat. 1218]:

"When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer."

29 U.S.C. § 1383 [94 Stat. 1218, 1220]:

"(a) For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer —

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

"(b) (1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if —

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan —

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if —

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer —

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

* * *

"(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations."

* * *

29 U.S.C. § 1385(a) [94 Stat. 1221]:

"(a) Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year —

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation."

* * *

29 U.S.C. § 1306(a)(3)(A) [94 Stat. 1264-65]:

"(3)(A) [T]he annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this subchapter is —

* * *

(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of —

(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

(II) $1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i),

(iii) in the case of a multiemployer plan, for plan years beginning after September 26, 1980, an amount equal to —

(I) $1.40 for each participant, for the first, second, third, and fourth plan years,

(II) $1.80 for each participant, for the fifth and sixth plan years,

(III) $2.20 for each participant, for the seventh and eighth plan years, and

(IV) $2.60 for each participant for the ninth plan year, and for each succeeding plan year."

29 U.S.C. § 1307 [88 Stat. 1013; 94 Stat. 1300]:

"The plan administrator of each plan shall pay the premiums imposed by the corporation under this subchapter with respect to that plan when they are due . . ."

29 U.S.C. § 1461(c)(2) [formerly 29 U.S.C. § 1381(c)(2); 88 Stat. 1034; 94 Stat. 1267]:

"The corporation may, in its discretion, pay benefits guaranteed by this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the sixty months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980."

STATEMENT OF THE CASE

This case presents the question whether Congress has the power, within the scheme of a "comprehensive and reticulated statute," to require one private party to pay money to another private party, based on events outside the control of the deprived party. The statute challenged in this case attempts to use legislative power at a level significantly higher than the power of eminent domain. While eminent domain operates within the limits of the Taking Clause and must guarantee just compensation to the deprived party, the "withdrawal liability" statute makes no provision for compensation of the employers required by Congress to pay money to multiemployer pension trusts. When Congress imposes such a severe impact upon personal rights in ownership of property. the Governmental action deserves especially close scrutiny by this Court to assure that the fundamental liberties protected by the Constitution remain fully intact. Such scrutiny will disclose that Congress has gone outside the bounds of "regulation" by requiring an employer to pay money to a pension trust, when the contract relations of the private parties clearly did not create such an obligation and prior regulatory conduct had given no hint of such precipitous risk. In all fairness, the statute "takes property" and, therefore, is either invalid or must afford just compensation in compliance with the Taking Clause.

The Trustees administer the Operating Engineers Pension Plan ("Plan") according to a written Agreement Establishing the Operating Engineers Pension Trust made in 1960 pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 186(c)(5)]. JA 29-31. This labor-management Pension Trust receives contributions from several thousand employers under written collective bargaining agreements covering employees in the construction industry of

Southern California and Southern Nevada. R. 117, p. 2. The employers periodically enter into collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), by which the employers agree to abide by the Trust Agreement and to pay certain contributions to the Pension Trust each month. The amount contributed by each employer is determined by multiplying the employees' hours of employment by an hourly rate specified in the collective bargaining agreement. R. 117, p. 6. Under the express terms of the Trust Agreement (JA 30-31) and the Plan (JA 31-32), the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. JS *App.* 19-20, 32, 33. This is true even though the contributions may be insufficient to pay the benefits described in the Plan. JS *App.* 20. The benefits described in the Plan are established by the Trustees based on an actuarial estimate of the sufficiency of Trust assets to pay the benefits, and the Trustees retain authority under the Trust Agreement to adjust the benefits in light of experience and other actuarial considerations. JA 31-33.

Because under the collective bargaining agreement, the Trust Agreement and the Plan the employer promises only a fixed contribution, not a fixed benefit, the Trustees in 1975 sought an administrative ruling by PBGC that the Plan is a "defined contribution plan" excluded from PBGC's jurisdiction by the statute. JA 9-20. PBGC ruled that the Plan is a "defined benefit plan" and claimed the right to receive payments of annual "premiums" from the Pension Trust. JA 21-23. This action by PBGC had the

effect under the statute of treating contributing employers of the Pension Trust as liable for "employer contingent liability" in amounts as much as 30% of the employer's net worth if the Plan were to terminate with insufficient assets to pay the benefits described in the Plan. JS *App.* 35.

The Trustees filed this action on June 17, 1975, seeking recovery of the "premiums" paid to PBGC and a determination that the Plan was a "defined contribution plan" under the statute. JA 1 *et seq.* Alternatively, the Trustees' complaint sought a permanent injunction against enforcement of the "contingent liability" statute on grounds that the statute takes the property of the Pension Trust and its contributing employers in violation of the Due Process Clause and the Taking Clause of the Fifth Amendment and unconstitutionally impairs the contract rights of the Trustees, the employers, Local 12 and the participants of the Plan. On February 12, 1976, the district court granted summary judgment to the Trustees on grounds that the Plan was properly to be regarded as a "defined contribution plan," particularly because the employer has promised no "fixed benefits" and to do otherwise would be "to force upon the employer a greater obligation and liability than he had agreed to in his contract." JS *App.* 49, 50 (419 F.Supp. at 740, 741). On appeal, the Ninth Circuit reversed, based upon statutory interpretation to the effect that "[t]he precise intent of [the federal statute] was to impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan." JS *App.* 35 (581 F.2d at 732). This Court denied the petition for certiorari filed by the Trustees. 440 U.S. 935.

On remand, the district court declined to convene a three judge court on grounds that the constitutional issues raised by the Trustees were insubstantial, citing a 1947 decision of this Court involving a challenge of the

Home Owner's Loan Act of 1933. JA 55-56. After summary denials of the Trustees' petitions for writ of mandamus in the Ninth Circuit and this Court, on appeal the Ninth Circuit reversed and remanded with directions that a three judge court be convened to determine the substantial constitutional questions raised. JS *App.* 25 (673 F.2d at 1114).

On remand from the second appeal, the district court requested that a three judge court be convened on June 21, 1982. JA 61. During the litigation to convene a three judge court, ERISA was amended by the MPPAA to change "contingent liability" to "withdrawal liability," by which an employer whose contract obligation to pay contributions to the Pension Trust had ceased would be required to pay the Pension Trust amounts calculated in accordance with the statute. The Trustees filed an amended complaint addressing the amended statute on August 16, 1982. JA 62-75. By order filed December 14, 1982, four employers whose collective bargaining agreements had been terminated and who had received notifications from the Pension Trust of withdrawal liability claims as required by the statute, were granted leave to intervene in the action.[3] JA 82-87.

The Trustees' amended complaint challenged the amended statute imposing "withdrawal liability" on grounds that the statute takes the private property of the employers for the private use of others and provides no compensation for the property taken. JA 72, 74. In addition, the amended complaint maintained the challenge of the original statutory requirement of "premium" payments to PBGC and further contended that the Taking

---

[3]The intervening employers included Woodward Sand Company, Inc. ("Woodward"), appellant in the consolidated appeal.

Clause is violated by the amended "premium" requirements. JA 73-74.

The Trustees filed a motion for summary judgment on May 13, 1983, and the intervening employers filed a parallel motion for summary judgment on May 16, 1983. The Trustees contended that the statutory imposition of "withdrawal liability" on employers whose contract obligations to the Pension Trust had ceased would be a taking of private property for private use, and would be taking property without compensation, in violation of the Taking Clause of the Fifth Amendment. Further, the Trustees contended that the statutory provisions requiring payment of "premiums" by the Pension Trust to PBGC after the 1980 amendments of the statutory scheme were inseverable from "withdrawal liability" and, finally, that the statutory design for collection and expenditure of "premiums" by PBGC for coverage of plans terminated prior to the 1980 amendments violated the principle of Separation of Powers by delegating legislative authority to PBGC to determine the use of the funds.

The duly convened Three Judge Court heard oral arguments on the motions for summary judgment on October 24, 1983. On May 1, 1984, the Three Judge Court filed an Order Granting Summary Judgment To Defendant holding the statute to be constitutional and denying injunctive relief. In disposing of the Trustees' contentions that the "withdrawal liability" statute takes property from the withdrawn employer and gives the property to the Pension Trust for private use without compensation to the employer, the Three Judge Court saw no need to determine whether the statutory use of property was public or private, or whether the "taking" was compensated. Instead, the Three Judge Court concluded "that no 'property' was involved in this case" (JA 110) based on reasoning that "the contractual right which insulates

employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the Takings Clause." JA 110-111. Regarding the Due Process Clause issues, the Three Judge Court summarily concluded that the statutory provisions existing between 1974 and 1980 were rational (JA 112) and reached the same conclusion regarding the amended statute after further analysis. JA 116. Finally, the Three Judge Court declined to reach the merits of the Separation of Powers issue on grounds that the issue became moot upon amendment of the statute in 1980. JA 116-117. Judgment was entered on December 4, 1984. JA 119-121.

SUMMARY OF ARGUMENT

Whether government action has gone beyond "regulation" and effected a "taking of property" is determined by the Court through a factual inquiry into factors including the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, ____, 104 S.Ct. 2862, 2874-75 (1984). The "withdrawal liability" statute challenged in this case [29 U.S.C. §§ 1381(a) *et seq.*] takes property by requiring a transfer of wealth from one private party to another.

The statute cannot be a "regulation" of existing collective bargaining agreements because the "taking" is triggered by failure to reach a *future* agreement with a union, an event outside the control of the employer whose property is taken. Similarly, the statute cannot be a "regulation" of pension plan administration because pre-existing federal law places such affairs in the hands of independent fiduciaries outside the control of the employer. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 2789 (1981).

The Three Judge Court below unfairly characterized the statute as merely abrogating a contract right "to escape one's own liability." Such a sophistic analysis would permit Congress to avoid entirely the limitations of the Taking Clause by imposing *statutorily* a new "contract" obligation, and simultaneously abrogating contractual defenses to it. Contracts furnish no better foundation for such legislative "taking" than many other commercial and social relationships, and every legislative act must be limited by the Taking Clause. Fair characterization of the statute is crucial in preserving Taking Clause protection: the "withdrawal liability" statute takes money from an employer and transfers it to a pension trust.

The statute causes the deprived party actually to part with his property, rather than merely suffer continued use of the property under regulatory limits. The amounts of money taken by the statute are generally very substantial, and may actually exceed the net worth of the employer as a going concern. The economic impact of the statute is much more severe than has been true in previous decisions of this Court granting Taking Clause protection to deprived parties.

The most basic expectation of collective bargaining parties during the past fifty years has been shaped by the *fundamental theme* of national labor policy: The employer and the union must bargain in good faith toward a final agreement without government interference in setting the terms and, if agreement is reached, each party's obligation will be judicially enforceable according to their mutual intent. *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-84, 92 S.Ct. 1571, 1579-80 (1972). To contend that an employer should expect Government action to adjust retroactively the economic terms

of collective bargaining agreements covering past employment is to suggest that the *fundamental premise* of national labor policy has been a cruel and deceitful hoax, using the good faith of employers to aid in their entrapment.

Likewise, prior regulation of retirement plans gave no warning of such drastic governmental action. The 1974 enactment of ERISA, far from serving as advance warning, actually cast the net of liability over employers participating in multiemployer pension plans, because heeding the "warning" would have caused immediate termination of such plans and imposition of liability by the 1974 statute in amounts up to 30% of the net worth of each employer. Prior to 1974, multiemployer pension plans were regarded under the tax laws and under the labor laws as "money purchase" or "defined contribution" pension plans under which the obligation of the employer was established in terms of a "fixed contribution" payable to the pension plan, rather than a "fixed benefit" payable to the employee.

To take the property of the employer under such circumstances in the guise of "regulation" would rob the Taking Clause of its intended meaning, when the historic role of the Court must be to preserve in complete fullness the fundamental human liberties expressly protected by the Constitution. The right to own the fruits of private endeavor is the right most fundamental to the functioning of liberal democracy, and is a key limitation on the power of the state over the individual.

The "withdrawal liability" statute takes property for *private* use, even though legislative authority to determine "public use" is coterminous with the police power of the state, because Congress has no proper interest in determining which of two private persons owns wealth. The property taken by this statute is money, which is fungible,

and the ownership of particular money can be of no public concern. This case presents the absolute, bare essence of the "public use" limitation in the Taking Clause.

The "withdrawal liability" statute makes no provision for compensation of the employer from whom property is taken, but neither is a Tucker Act remedy expressly withdrawn. *Cf., Monsanto,* ____ U.S. at ____, 104 S.Ct. at 2880. However, withdrawal of a Tucker Act remedy must be implied, otherwise Congress necessarily intended to pay money as compensation for the taking of money, thereby opening the Federal Treasury to the financial burden of paying the costs of privately created retirement benefits.

Upon due consideration, the withdrawal liability statute takes private property for private use without just compensation, in violation of the Taking Clause. Accordingly, the statute must be stricken in order to avoid the much more significant infringement of constitutionally protected liberty.

Invalidation of "withdrawal liability" requires that the inseparable "premium" statute enacted in 1980 be nullified, because Congress would not have enacted one without the other and neither can be fully operative as a law without the other. *I.N.S. v. Chadha,* ____ U.S. ____, ____, 103 S.Ct. 2764, 2775 (1983).

Finally, the 1974 premium statute should be nullified as a violation of the Separation of Powers principle because the statute authorizes PBGC to use the funds collected "in its discretion" without any "intelligible principle" to serve as guidance. *Hampton & Co. v. U.S.,* 276 U.S. 344, 409, 48 S.Ct. 348, 352 (1928). PBGC should be enjoined permanently from taking any action to enforce the statutes declared invalid.

ARGUMENT

I

THE WITHDRAWAL LIABILITY STATUTE TAKES PRIVATE PROPERTY FROM ONE PERSON AND TRANSFERS OWNERSHIP TO ANOTHER FOR PRIVATE USE, WITHOUT PROVIDING JUST COMPENSATION.

This case presents the most significant Taking Clause issues faced by the Court in recent times. During the framing of the Constitution, a deeply held suspicion of representative democracy was the prospect of a legislative body influenced by majoritarian factions to oppress other less powerful citizens. The most heinous offense feared was the possibility that Congress might actually require the transfer of privately owned property from one disfavored group of citizens to other private beneficiaries. Almost 200 years after ratification of the Constitution, that offensive legislative action has come to pass in the guise of socioeconomic regulation of contracts. Fortunately, the Framers of the Constitution erected the Taking Clause of the Fifth Amendment as an express prohibition against such legislative conduct, and furnished a sufficiently clear record of the protections intended for the fundamental freedoms involved. As will be shown, the recognition and preservation of rights protected by the Taking Clause reach to the very essence of successful political democracy, and must prevail over the dictates of any single statutory scheme.

A. The Framers Of The Constitution Intended To Prohibit Action By The Federal Government Transferring Private Wealth From One Person To Another.

James Madison expressed eloquently at the constitutional convention his concern for the protection of the

rights of individuals from oppression at the hands of a democratic legislature influenced by more powerful factional interests.

> "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property and the public liberty, [will not be secure in their hands]. . . ."
>
> 2 The Records of the Federal Convention of 1787, 203-04 (M. Farrand ed. 1911).

In his letter to Thomas Jefferson of October 14, 1787, Madison stated further this concern for protecting minority rights against legislative action to redistribute private property:

> "In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest . . . [These distinctions will produce dissention and faction.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority." *Reprinted in* 5 *The Writings of James Madison* 29, G. Hunt ed. (New York: Putnam, 1900-1910).

Madison had witnessed first hand the propensity of legislatures to serve popular desires while serving in the Virginia House of Burgesses.

> "In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure. . . . Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."
>
> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In *The Federalist* Number 10, Madison argued for a republican, rather than a purely democratic, form of government as essential to the preservation of minority rights, particularly the right of ownership in private property.[4] When its ratification was assured, Madison

---

[4] "Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. . . .

". . . [T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in

reversed his earlier opposition to any alteration of the Constitution, *see* Letter from James Madison to George Eve (Jan. 2, 1789) *reprinted in* 5 *The Writings of James Madison* 319-21, n. 1, and supported amendments as "additional guards in favor of liberty," *id.*, introducing on June 8, 1789, a draft of twelve proposed amendments to the first session of Congress. One of the twelve amendments was:

> "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L. Rev. 553, 595 (1972).

The Taking Clause of the Fifth Amendment was then adopted with the specific intent to protect rights in ownership of property from Congress, since ". . . a law that takes property from A. and gives it to B. . . . is against all reason and justice." *Calden v. Bull,* 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798).

---

society . . . A landed interest, a manufacturing interest, a merchantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes actuated by different sentiments and views. The regulation of various and interfering interests forms the principal task of modern legislation. . . .

". . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . .

"[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . .

"A republic . . . promises the cure for which we are seeking. . . ." The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868).

While Madison is widely regarded as the "father" of the Constitution, his views regarding the central role of an individual's freedom to acquire and own property were widely shared among the Framers and others who influenced them. *See* B. Schwartz, *A Commentary on the Constitution of the United States: Part II, The Right of Property* 18-22 (1965), and *Part III, The Rights of the Person* 8 (1968); Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 Vand. L. Rev. 681, 682-83 (1974). John Adams held the view that "property must be secured or liberty will not exist." (P. Freund, *The Supreme Court in the United States* 35 (1961)). John Locke, who provided "the accepted theory of government in America when the American doctrine of eminent domain was being hammered out" (Stoebuck, *A General Theory of Eminent Domain, supra*, 47 Wash. L. Rev. at 586), believed the protection of individual rights in property to be essential to the nature of liberal government: "For the preservation of Property being the end of Government, and that for which men enter into Society, it necessarily supposes and requires, that the People should have Property * * *." J. Locke, *An Essay Concerning Civil Government*, in J. Locke, *Two Treatises of Government*, 378-80 (P. Laslett ed. 1960). *See* Stoebuck, *A General Theory, supra*, at 585-86, regarding the essence of Lockeian social contract theory. Madison himself reiterated: "Government is constituted no less for protection of the property, than of the persons, of individuals." *The Federalist* No. 54 at 370 (J. Cooke ed. 1961).

B. The "Withdrawal Liability" Statute Effects A Taking Of Property.

This Court recently traced its experience and reasoning in dealing with issues raised under the Taking Clause of the Fifth Amendment as follows:

> "As has been admitted on numerous occasions, 'this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action" ' must be deemed a compensable taking. (Citations omitted.) The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry. (Citations omitted). *The Court*, however, *has identified several factors that should be taken into account when determining whether a government action has gone beyond 'regulation' and effects a 'taking.'* Among these factors are: *'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'* " (Emphasis added.) *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2874-75 (1984).

(1) *The Character Of The Governmental Action.*

The "withdrawal liability" statute enacted by Congress requires one person (an employer) to pay money to another party (a pension trust) if the employer is unable to reach a new collective bargaining agreement with his employees' union requiring additional contractual payments to the pension trust. In essence, the statute requires a transfer of wealth from *A* to *B*, *A* and *B* each being private parties.[5]

---

[5]This statutory requirement is essentially different from "regulation." To "regulate" is "to prescribe the rule by which [conduct] is to be governed," and such regulation may "aid, foster and protect the [conduct, or] prohibit it." *U. S. v. Darby*, 312 U. S. 100, 113, 61 S.Ct. 451, 456 (1941). Many aspects of ERISA and some provisions of the MPPAA comprise "regulation" of conduct, but § 1381(a) is plainly legislative conduct of a different nature. This statute requires ownership of property to be delivered from one party to another — obviously a legislative act which takes property. As will be shown, application of the Taking Clause limitation to this legislative conduct cannot be avoided merely by enacting the "taking" statute as part of

The statute is not fairly characterized as regulating an existing collective bargaining agreement between the employer and the union, because the event which triggers the statutory "taking" is the employer's failure to achieve a consensual *future* agreement with a labor union.[6] Obviously, mutual agreement on the terms of a future contract with a union is outside the discretion and control of the employer and, therefore, the statute effectively takes private property based on an event beyond the control of the deprived party.[7]

Moreover, the statutory taking of property from the employer cannot be characterized fairly as a governmental effort to regulate the administration of multiemployer pension plans. The administration of such a pension plan is outside the control of the individual employer. Each union-sponsored employee pension trust is required by Congress to be established by a written agreement, with

---

a "reticulated" statutory scheme which involves other "regulatory" provisions.

[6]Failure to achieve a new collective bargaining agreement may result from disagreement on any issue which is a mandatory subject for collective bargaining, *i.e.*, any issue relating to "wages, hours and other terms and conditions of employment." *See, Allied Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164, 92 S.Ct. 383, 389-90 (1971). The "withdrawn" employer may have been willing to continue pension contributions, but unwilling to agree to other bargaining proposals by the union. Of course, the union has a duty to represent the interests of active employees, but no statutory duty to represent retirees in negotiations with the employer. *Id.*, 404 U.S. at 181, 92 S.Ct. at 398, n. 20.

[7]The brief *amicus curiae* filed by the American Trucking Associations, Inc. argues that the MPPAA, in effect, requires the employer to carry on its business at a loss, in violation of the Taking Clause, citing *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 40 S.Ct. 183 (1920), and a subsequent line of cases. Indeed, the MPPAA provides for the degree of "loss" to be defined by the terms of the future agreement required by the labor organization.

assets "held in trust" and administered "for the sole and exclusive benefit of the employees . . . and their families and dependents . . ." 29 U.S.C. § 186(c)(5).

> "[N]othing in the language of § 302(c)(5) [29 U.S.C. § 186(c)(5)] reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed. (Footnote omitted.) And the legislative history of the LMRA confirms that § 302(c)(5) was designed to reinforce, not to alter, the long-established duties of a trustee.
>
> ". . . In sum, the duty of the management-appointed trustee of an employee benefit fund under Section 302(c)(5) is directly antithetical to that of an agent of the appointed (sic) party.
>
> "Whatever may have remained implicit in Congress' view of the employee benefit funds trustee under the [LMRA] became explicit when Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829. ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-32, 101 S.Ct. 2789, 2794-95 (1981).

Thus, with the discretionary administration of multiemployer pension plans clearly beyond the control of the individual employer, the "withdrawal liability" statute cannot be fairly characterized as a legislative effort to regulate the prudent administration of such plans.

Nor may the taking of the employer's property be viewed as a loss resulting from "the consequences of his own neglect" or his failure to comply "with reasonable regulatory restrictions the legislature has imposed." *Cf., U.S. v. Locke*, ____ U.S. ____, 105 S.Ct. 1785, 1799 (1985).

The individual employer is powerless to avoid the statutory taking of property except by consenting to new contractual terms specified by another private party (the union).

By comparison, the Three Judge Court below found "no property at issue in this case" (JA 111), characterized the governmental action as mere interference with a "purely contract-based 'right' to avoid liability for further contributions to the pension plans . . ." and declined ". . . to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause." *Ibid.* This characterization inaccurately asserts the existence of "one's own liability", since without dispute the individual withdrawing employer has *no further contractual liability* to the affected pension plan in the absence of the money obligation imposed as "withdrawal liability" by the statute. The sophistic analysis of the Three Judge Court implicitly assumes that the Congress can impose by statute a new "contract" obligation, and then merely abrogate contractual defenses to that obligation, thereby taking property without ever encountering the prohibition of the Taking Clause.

Congress can not empower itself to take property merely by calling the taking a "consequential incidence" of economic regulation. *See U. S. v. Security Industrial Bank,* ____ *U.S.* ____, ____, 103 S.Ct. 407, 411-12 (1982), discussing *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 55 S.Ct. 854 (1935), and *Armstrong v. U. S.,* 364 U.S. 40, 80 S.Ct. 1563 (1961). In those cases, this Court found Taking Clause protection for lien rights owned by: (1) a lender in real estate *(Radford)*; (2) a materialman in naval boats under construction *(Armstrong)*; and (3) a lender in consumer household appliances *(Security)*. Properly, the Court declined to permit

characterization of the challenged statutes in those cases as "regulation" of contracting practices in farm lending, naval ship building, or consumer lending to justify avoidance of the Taking Clause.

As the district court and the court of appeals below have recognized (JS *App.* 19-20, 32, 33, 35, 46-48, 49), the parties to the collective bargaining agreements and the Trust Agreement in this case created clear and unambiguous obligations which are fully performed when the agreements expire. Such a contractual relationship affords no better foundation than Congress might find in other societal relationships to serve as the regulated *nexus* giving rise to a perceived public interest in achieving the transfer of property between private parties. Surely employers who have bargained in good faith and fully performed the resulting mutual agreement are not more culpable or vulnerable to such legislative action than, for example, citizens in a community which has engaged in a pattern of conduct offensive to a popular majority. If the pattern of conduct is entirely lawful at the time and, indeed, even salutary in its beneficial effects on those affected most directly [*cf., Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250, 98 S.Ct. 2716, 2725 (1978)], are the citizens of that community subject to a statutory redistribution of their property based on the past conduct? The Taking Clause and this Court would surely not permit it to be so, and this case is not substantially different. Those who framed the Constitution intended to strengthen commerce by encouraging individuals to enter into contractual relationships and to offer employment to others — not to authorize Government to subject its most enterprising citizens to retroactive burdens and forfeitures for having done so.

If Congress can transfer money from an employer to a pension trust by "regulation," then why may Congress not

take land from a dairy farmer by "regulation" to serve the public interests through an interstate highway system, since any adjoining landowner would certainly be intimately involved in the need for such a highway? Moreover, if Congress has such "regulatory" taking power, then why might the State of Hawaii not have chosen to "regulate" the land leases involved in *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 104 S.Ct. 2321 (1984), simply requiring the lessor to transfer fee title to the lessee upon termination or upon achieving certain tenure specified by the legislature, with no provision for compensation to the deprived landowner? Granting such power to Government would be tantamount to embracing fully the redistributive social theories of Rousseau ["the state's proper function is to redistribute, to the end that 'all have something and none of them has too much' "], *see*, Stoebuck, *A General Theory of Eminent Domain, supra*, 47 Wash. L. Rev., at 587-88, a divergence of a full 180 degrees from the Lockeian principles adopted by the Framers.[8]

---

[8]"For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation, see *PruneYard Shopping Center v. Robins*, [*infra*, 447 U.S. at 82-83 and n. 7, 100 S.Ct at 2041 and n. 7], and the Equal Protection Clause." *Richmond Newspapers, Inc. v. Virginia, infra*, 448 U.S. at 594, 100 S.Ct. at 2837 (Mr. Justice Brennan, concurring in the judgment).

Equity alone, of course, will not suffice. The conviction must be shared that the constitution will be enforced according to the intent of its Framers, not "repealed by implication" to accommodate the views of contemporary social theoreticians who, with Rousseau, would argue that the complexities of modern society require more sophisticated, and sweeping, powers of government. If such theories are to be put into practice, they should first be subjected to the rigors of the constitutional amendment process.

Thus, the fair characterization of the governmental action is the most crucial element of Taking Clause protection. As shown above, the withdrawal liability statute effects neither regulation of the employer's collective bargaining agreement nor regulation of the fiduciary adminstration of the pension plan. The statute takes money from the employer and transfers it to the pension trust unless the employer reaches a new agreement with the union requiring additional contributions to the pension trust. Were Madison and the Framers to confront a description of this congressional act as "imposing by statute a contract obligation, together with concurrent abrogation of contractual defenses," undoubtedly they would recognize it simply for what it is: a governmental taking of property.

(2) *The Economic Impact Of The Governmental Action.*

The employer who must pay "withdrawal liability" imposed by the statute is required to pay money, either in a lump sum or according to a schedule of installments with interest. 29 U.S.C. § 1382, § 1399(b)(1), § 1401(d). The deprived party must actually part with his money — the ownership, use and enjoyment of his private property.[9] The deprived party does not retain ownership of his property, with its use merely limited by governmental regulation as was the case in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980), and in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646 (1978). Although the specific amount of "withdrawal liability" will vary greatly according to the particular pension plan and the employer, the monetary amounts are generally quite substantial in relation to the

---

[9]If any room for doubt exists, money is property. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340, 89 S.Ct. 1820, 1822 (1969).

size and worth of the employer.[10] In practically all cases, the severity of the economic impact of withdrawal liability on the employer has a significantly higher magnitude than existed, for example, in *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980), [where interest on funds deposited in court pending litigation was protected from governmental taking], or in *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S.Ct. 383 (1979) [where the owner of an improved pond was required to be compensated for any "taking" of a public right of access into the body of water]. To match the severity of withdrawal liability, the complaining party in *Webb's* would have to lose the funds deposited, and the pond owner in *Kaiser Aetna* the pond itself. The amount of withdrawal liability may actually exceed the entire net worth of the employer as a going concern, although the liability is limited between 30% and 80% of net worth if the employer is in bankruptcy or liquidation. *See* 29 U.S.C. § 1405.

(3) *Interference With Reasonable Investment-Backed Expectations.*

The reasonable expectation of the employer is that, when his justly incurred debts are paid, the fruits and profits of his labor and investment will remain his private property.[11] In the context of this case, the only monetary obligations contractually incurred by each employer arise from the terms of a collective bargaining agreement between the employer and a union. Under longstanding

---

[10]The existing withdrawal liability claim against Woodward, a relatively small, family-owned corporation operating a sandpit as a construction materials supply business, is in excess of $200,000.00.

[11]"Private property, in every defense made of it, is supposed to be the guarantee to individuals of the fruits of their own labor and abstinence." John Stuart Mill, *Principles of Political Economy*, pp. 203-204 (Sir William Ashley ed. 1909) (*reprinted in* 1969, New York: Augustus M. Kelley).

and fundamental national policy, each employer had every reason to believe that federal law would require full performance of the consensual undertakings of the two bargaining parties — no more and no less.

(a) *Regulation of Collective Bargaining Agreements*

In *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-84, 92 S.Ct. 1571, 1579-80 (1972), this Court traced the history of the "fundamental theme" of the National Labor Relations Act ("NLRA"), beginning with the history of that legislation:

> "It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."
>
> S.Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

This Court promptly enforced that policy, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 57 S.Ct. 615, 628 (1937), and in 1947 Congress "made this policy an express statutory mandate" by enacting § 8(d) of the NLRA [29 U.S.C. § 158(d)]. *N.L.R.B. v. Burns International Security Services, Inc., supra,* 406 U.S. at 283, 92 S.Ct. at 1580.

At the same time, Congress enacted § 301 of the Labor Management Relations Act of 1947 ("LMRA") [29 U.S.C. § 185] granting federal courts jurisdiction over suits to enforce agreements between employers and unions. The central purpose of § 301 was to assure both parties that the terms of agreement reached at the bargaining table would be faithfully enforced by the courts. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451-54, 77 S.Ct. 912, 915-17 (1957).

Throughout the history of the NLRA, this Court has repeatedly reminded the National Labor Relations Board and the lower courts that federal law requires unions and employers to bargain in good faith, but otherwise the bargaining parties "should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *N.L.R.B. v. Insurance Agents,* 361 U.S. 477, 488, 490, 80 S.Ct. 419, 426 (1960). *See, also, N.L.R.B. v. American National Insurance Co.,* 343 U.S. 395, 404, 72 S.Ct. 824, 829 (1952). In *H. K. Porter Co. v. N.L.R.B.,* 397 U.S. 99, 108, 90 S.Ct. 821, 826 (1970), the Court summarized as follows:

> "One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, (footnote omitted) allowing the Board to compel agreement when the parties themselves are unable to agree would violate *the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."* (Emphasis added.) *Ibid.*

This "fundamental premise" was part and parcel of the congressional intent expressed in enacting § 301:

> "[T]o encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S.Rep. No. 105, 80th Cong., 1st Sess., p. 16; *Textile Workers Union v. Lincoln Mills, supra,* 353 U.S. at 454, 77 S.Ct. at 916.

When the Government had elicited employers and unions to place their full faith and confidence in collective

bargaining upon this "fundamental premise" for 40 years, employers could reasonably expect that the same policy would continue. *At the very least,* the bargaining parties could reasonably expect that the Government would not attempt to modify the substantive obligations of the bargaining parties arising from collective bargaining agreements covering employment during years prior to enactment of the new congressional policy. Yet this is precisely the effect of the challenged "withdrawal liability" statute upon employers whose collective bargaining agreements have required payments on behalf of their employees to pension trusts administering multiemployer pension plans.

(b) *Regulation of Retirement Plans*

PBGC defends the 1980 enactment of the withdrawal liability statute by contending that any employer should have known "that its contracts were . . . subject to regulation" because ERISA had been enacted in 1974 and, "[e]ven prior to 1974, federal regulation of pension benefits served to put employers on notice that they were subject to congressional regulation if they chose to offer deferred compensation to employees." *Motion to Affirm,* p. 7.

Dealing first with the contention that enactment of ERISA gave fair notice of the 1980 amendments creating "withdrawal liability," the 1974 legislation actually served to entrap employers participating in multiemployer pension plans by use of a governmental taking statute similar to "withdrawal liability." Section 4064 of ERISA, 88 Stat. 1031, 29 U.S.C. § 1364, made each employer participating in a multiemployer pension plan liable for a prorata share of the cost of unfunded vested benefits described in the pension plan if the pension plan were to be terminated within five years after the withdrawal of the employer. That "contingent liability" was

limited by Section 4062(b)(2) of ERISA, 88 Stat. 1029, 29 U.S.C. § 1362(b)(2), to a maximum of 30% of the net worth of the individual employer. The effect of the 1974 statute, therefore, was not to provide "fair warning" but to impose immediate liability in the event each employer elected to end its collective bargaining agreement, thereby necessarily causing termination of the multiemployer pension plan.

In response to the contention that any single employer could withdraw after 1974 without causing termination so long as other employers remained in the multiemployer pension plan, the constitutional soundness of a statute cannot be made dependent upon the willingness of some affected parties to waive its effects upon them. Thus, if the suggestion that the 1974 statute served as "fair warning" is to be viewed in the proper light, the statute must be evaluated as to its impact when every affected party actually heeds the warning. Plainly, the net of liability was first cast in 1974, and each employer's statutorily imposed liability would have become due and payable at that time if all had heeded the "fair warning" to abandon participation in their multiemployer pension plans. Instead, this action was filed in 1975, and amended after the 1980 statutory revisions, to claim constitutional protection against the offensive legislative conduct.

Likewise, pre-1974 regulation of retirement plans gave no fair warning of an impending taking of property from employers participating in such plans. Before 1974, the distinction between a "defined contribution plan" and a "defined benefit plan" was whether the employer promised a "fixed contribution" or a "fixed benefit."[12]

---

[12]J. J. Melone, *Collectively Bargained Multi-employer Pension Plans*, at 19 (1963).

The Operating Engineers Pension Plan involved in this case and other such multiemployer pension plans were qualified under § 401(a) of the Internal Revenue Code [26 U.S.C. § 401(a)] as "money purchase pension plans" on the basis that the employer's contributions under such plans "are fixed without being geared to profits."[13] At the same time, the U.S. Department of Labor viewed each multiemployer pension plan as a "defined contribution plan."[14]

Labor organizations were well informed of the significance of the distinction between an employer's promise to pay a "fixed contribution" and a promise to pay a "fixed

---

"Pension Plan benefit formulas may be broadly classified by the nature of the employer's financial commitment, *i.e.*, in terms of defined contributions or defined benefits."

[13] *I.R.C. Reg. § 1.401-1(b)(1)(i)*:

"... a Plan ... will, for the purposes of Section 401(a), be considered a pension plan if the employer contributions ..., in the case of money purchase pension plans, ... are fixed without being geared to profits."

[14] An official publication of the U.S. Department of Labor contained the following definitions:

"Defined Benefit Plan. A pension plan which provides a definite schedule of benefits. *The employer's contributions under such a plan are determined actuarially on the basis of the benefits expected to become payable.* Also called 'fixed benefit' plan." (Emphasis added.)

"Defined Contribution Plan. *A pension plan under which the employer's contributions are fixed, e.g., a fixed amount for each hour worked or a fixed percentage of compensation. Two types are: money purchase plans and collectively bargained multiemployer plans.*" (Emphasis added.)

Glossary — Correspondent Course On Pension Plans, Office of Labor-Management and Welfare Pension Reports, U.S. Department of Labor, October, 1969.

benefit."[15] This knowledge was pursued to great advantage in collective bargaining negotiations aimed at achieving participation in multiemployer pension plans by millions of employees otherwise foreclosed from providing for their retirement, and by 1974 such plans covered about 8 million participants. Labor unions could not have been so successful if saddled with the burden of persuading small employers to accept open-ended liability for the cost of benefits, rather than liability for a known, fixed contribution.[16]

Even the process of enacting ERISA itself gave no warning of any impending reversal of national policy. The chairman of the House Ways and Means Committee (Mr. Ullman) stated on the floor of the House at the time of enactment that "plan termination insurance is mandatory for private defined benefit plans" without giving the slightest indication that the Joint Conference Committee intended any abandonment of the traditional distinction

---

[15]"... The benefit approach has certain serious drawbacks. Mapping out all of the details and provisions of a pension plan across a bargaining table can be a complicated and harrowing proposition, that can drag on for weeks and even months...."

"... From the standpoint of negotiations, the fixed contribution approach simplifies the process of collective bargaining tremendously. No one has to be an expert to bargain on the straight question of how much money the employer is to pay; negotiations can proceed in pretty much the same fashion as though a straight wage increase were at issue." L. Kirkland, *Pension Plans Under Collective Bargaining — A Reference Guide For Trade Unions,* Department of Social Security of AFL-CIO, pp. 58-62 (1954).

[16]Indeed, if the trustees of multiemployer pension plans were deemed to be representatives of contributing employers for purposes of establishing and underwriting pension benefits, labor unions would lose the right to strike to require employers to participate in existing multiemployer plans with pre-designated trustees. See § 8(b)(1)(B) of the NLRA [29 U.S.C. § 158(b)(1)(B)] and *N.L.R.B. v. Amax Coal Co., supra.*

between a "defined contribution plan" and a "defined benefit plan." 3 *Legislative History of ERISA*, 4678. Not until the first decision of the court of appeals in this action was the effect of ERISA made apparent: the Joint Conference Committee had expressed the definition of "defined contribution plan" in such intricate wording as to make substantially every existing pension plan a "defined benefit plan." *See, Connolly v. PBGC*, 581 F.2d 729, 732-33 (9th Cir. 1978); JS *App.* 36-37.

(c) *The General Perspective of Expectations*

Viewing the entire history of governmental policy toward collective bargaining parties and employee retirement plans, nowhere can fair warning be found of the potential for statutory rebalancing of economic agreements reached between bargaining unions and employers. In the context of their reasonable expectations, the employers made investments of labor, ingenuity and capital, paid their employees the agreed compensation, and realized whatever profits or losses their enterprises produced. This is the essential process, described by Madison as naturally occurring in all free and civilized societies, which properly should assure each person the ownership of the fruits of his productivity. The Taking Clause was intended as the express guarantee of that right for all persons living under this Government.

The "fair warning" contention advanced on behalf of the challenged "withdrawal liability" statute would create a constitutional environment in which every citizen is deemed forewarned that he pursues his interests in peril of future enactments by the Government. This is an entirely unsatisfactory substitute for the environment guaranteed by our Constitution in which the inalienable rights of all persons are defended boldly by an express and reliable Bill of Rights.

Does the statute take property? To the person who has pursued his business, bargained in good faith, fully performed his consensual agreement and accumulated whatever profits or losses the rigors of competition have yielded, the answer must be affirmative. Thousands of such persons, dubbed by the challenged statute as "the withdrawn employer," face the outright loss of a major portion of their personal assets for no reason other than Government action. This is not a mere regulatory measure which will alter digits on corporate balance sheets and otherwise pass unnoticed, but an unparalleled and indelible move to take property from certain persons and give it to others in such a heavy-handed manner as to scar permanently the welfare and ethos of the deprived persons. No amount of rationalization for "socioeconomic contractual regulation" could explain or rectify the damage done to those persons or to the essential constitutional fabric of our liberal democracy by permitting this legislative act, particularly when the Taking Clause was specifically intended to bar such a result. As previously noted, Madison feared that a bill of specified rights in the Constitution might prove to be a mere "parchment barrier" when confronted with the will of a popular majority expressed through an enacted statute. 5 *The Writings of James Madison, supra,* at 271-275. The Court should not permit this to be the case in which Madison's foreboding is proved to be true as to the Taking Clause.

C. The Statute Takes Property For Private Use.

While the Taking Clause is an express protection set forth in the Fifth Amendment, and the power of the Government to seize private property for public use is merely implied in the power of the sovereign, the implied power of eminent domain is well established in the decisions of this Court. Twice recently this Court has held that the authority of Congress to declare a "public use"

requirement for the taking of private property is "coterminus with the scope of a sovereign's police powers" and that the role of the courts in determining "what constitutes a public use is extremely narrow." *Ruckelshaus v. Monsanto Co., supra,* ____ U.S. at ____, 104 S.Ct. at 2879; *citing Hawaii Housing Authority v. Midkiff, supra,* ____ U.S. at ____, 104 S.Ct. at 2329 (1984), and *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102 (1954). However, this Court has repeatedly shown willingness to give close scrutiny to assure the satisfaction of constitutional requirements when fundamental rights "deemed essential to the preservation of liberty" are involved, and "[s]urely, private property may be essential to the protection of liberty." *See* Thomas J. Coyne, "Hawaii Housing Authority v. Midkiff: A Final Requiem For The Public Use Limitation Of Eminent Domain?", 60 *Notre Dame L. Rev.* 388, 393-97, notes 81, 84, 86 and accompanying text.

This case involves the bare essence of the protection intended by the Taking Clause: the prohibition against governmental seizure of a person's wealth for transfer to another private party. The nature of the property taken as withdrawal liability — *money* — makes any public interest in the use of the property taken an impossibility, since the Taking Clause permits no Governmental interest, either under the police power or under the power of eminent domain, in determining whether one person or another owns wealth. While the public may have a broad range of interests in the ownership and use of particular property, *e.g.,* real estate or pesticides (*cf., Monsanto*), *the Taking Clause does not permit Congress to have an interest in determining which of two private citizens owns money.*

Moreover, *money is fungible property,* entirely indistinguishable from one dollar to the next, so the Government cannot substantiate a public interest in determining the use of the *particular* property to be taken from the

employer as "withdrawal liability." No particular money is different from any other money. Not only does this circumstance render impossible any contention that this particular property must be taken, the irrational result of a view that money can be seized for "public use" would necessarily require "just compensation" therefor — presumably money in an equal amount. When this Court finally draws the line around what is *not* property seized for a "public use," the line necessarily must be drawn short of permitting seizure of a person's monetary wealth.

The taking of money by the challenged statute in this case cannot be imbued with a "public use" by the nature of the use to which the funds are put. In every case, the direct recipient of the money taken is another private party, a multiemployer pension trust. The Funds will then be directed to the private use and enjoyment of individual beneficiaries of the particular trust, according to rules established by private fiduciaries. This remains a private use of property, rather than a public use, partly because of the private nature of the parties benefited, but fundamentally as a consequence of the fungible, monetary nature of the property transferred. No uniqueness, identity or particularity is present in the nature of the property to empower the theory of eminent domain with a public necessity when the property to be taken is money.

Recognition of broad legislative authority to determine "public use" has occurred in cases involving *compensated* takings.

> "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' (citations omitted.) . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held

> a *compensated* taking to be proscribed by the Public Use Clause." (Emphasis added.) *Hawaii Housing Authority v. Midkiff, supra,* ____ U.S. at ____, 104 S.Ct. at 2329-30.

At the same time, every decision of this Court finding a "public use" underlying a governmental seizure of property has reached that conclusion with respect to particular property whose private ownership must be displaced for the public good. Because finding a public purpose for a governmental displacement of a private person's ownership of money is "palpably without reasonable foundation," *Midkiff,* ____U.S. at____, 104 S.Ct. at 2329, the "withdrawal liability" statute fails to satisfy the "public use" requirement of the Taking Clause.

D. The Statute Provides No Compensation For The Property Taken From The Withdrawn Employer.

Equitable relief to enjoin the taking of private property for public use is not available when a suit for compensation can be brought against the Government after the taking. *Ruckleshaus v. Monsanto Co., supra,* ____ U.S. at ____, 104 S.Ct. at 2880. Generally, such a suit for compensation may be brought under the Tucker Act, 28 U.S.C. § 1491, *ibid.,* unless in the challenged statute ". . . Congress has . . . *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.' " *Id.,* ____ U.S. at ____, 104 S.Ct. at 2881. As in *Monsanto,* nowhere in the statute or its legislative history is there discussion of the interaction between the MPPAA and the Tucker Act, and any withdrawal of jurisdiction would be by implication only. Such "repeals by implication are disfavored." *Ibid.* Nevertheless, even if the employer's property is deemed to be taken for a "public use," the withdrawal liability statute should be invalidated for

failure to provide "just compensation" for the property taken as required by the Taking Clause.

Two fundamental facts concerning the "withdrawal liability" statute make an implied withdrawal of jurisdiction for a Tucker Act remedy uniquely compelling in this case. First, the property taken from the withdrawn employer is money, and Congress must necessarily be presumed irrational to intend that money be taken from an individual by one statute, while another statute pays the money back in a suit for "just compensation." Second, an intention to provide a Tucker Act remedy to each employer whose property is taken as "withdrawal liability" would have the effect of opening the treasury of the Federal Government to the potentially limitless financial burden of underwriting the cost of privately created pension benefits. The unwillingness of Congress to commit the U. S. Treasury to a general obligation even for federally created benefits administered by the Social Security Administration is longstanding and well documented. These circumstances negate the possibility that Congress intended the Tucker Act to complement the MPPAA by affording recourse to "just compensation" for property taken from the employer as "withdrawal liability."

E. Protection Of Rights In Private Property Is Essential To The Preservation Of Liberty And The Functioning Of A Liberal Republic.

The Court has made plain that no dichotomy should be permitted in the judicial enforcement of constitutional protections of rights in property as compared to other constitutionally protected rights.

> "[T]he dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights.* The right to enjoy property

> without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, *a fundamental interdependence exists between the personal right to liberty and the personal right to property.* Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. (Citations omitted.)" (Emphasis added.) *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972).

Freedom of speech, freedom of the press, the right of peaceful assembly, the right of privacy — all such rights are diminished almost beyond recognition if a person's property can be taken by the Government and given to others.[17] The right to acquire and own property without fear of governmentally-imposed forfeiture is the personal freedom most fundamental to a flourishing democratic society, and is a key limitation on the power of the state over the individual. *See* M. Novak, *The Spirit of Democratic Capitalism*, pp. 83-84, 153, 244, 307, 325-326 (Simon

---

[17] "[T]he First Amendment does not speak equivocally. . . . *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" (Emphasis added.) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827 (1980), Mr. Chief Justice Burger writing in support of the judgment of the Court, and quoting *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194 (1941).

Fully as much must be said of the unequivocal, explicit language of the Taking Clause of the Fifth Amendment. Recognizing that the First Amendment, indeed, "has a *structural* role to play in securing and fostering our republican system of self-government," *id.*, 448 U.S. at 587, 100 S.Ct. at 2833 (Mr. Justice Brennan concurring in the judgment), that structural role in substantial part is not an end in itself, but a means to an end of achieving security for individual rights in property.

& Shuster, 1982). Clearly recognized and carefully protected by Madison and the Framers of the Constitution, this fundamental premise of liberal society is receiving broader, rather than diminished, acknowledgment over the course of time.[18]

The substantial expansion of Governmental power inherent in Court approval of the challenged statute would comprise a historic regression from the pinnacle of achievement in the protection of human liberties which is embodied in the Constitution and its Amendments. The crucial role of this Court must be to preserve and give fullest substance to those liberties, rather than yielding to the constant, persistent efforts of the Government to increase central authority for its own advantage.

In applying its analytical techniques to preserve Taking Clause protection, the Court must be wary to avoid a *de facto* test that simply asks whether the particular use of power by Congress shocks the conscience of the Court. If the test for whether property has been taken is, at bottom, an inquiry into whether the specific use of legislative power has a sufficiently beneficial objective, then the Court will have succumbed to attesting the existence of legislative power based on tacit approval of the beneficial ends of a particular use of that power. Use of statutory ends to justify the means of legislative power to take

---

[18] "[P]rivate property, including that of productive goods, is a natural right possessed by all, which the state may by no means suppress." John XXIII, *Mater et Magistra*, 18 (1961).

"[E]xperience and history testify that where political regimes do not allow to private individuals the possession also of productive goods, the exercise of human liberty is violated or completely destroyed in matters of primary importance. Thus it becomes clear that in the right of property, the exercise of liberty finds both a safeguard and a stimulus." *Id.*, at 109.

property by "regulation" is fatally flawed in its constitutional logic and would eventually leave the Court without an adequate intellectual basis for curbing use of the same power to achieve other ends chosen by Congress. In essence, the Court must not test the statute only by the anachronistic standard of "substantive due process" — asking whether the means and ends of the particular statute are consistent with the Court's own conscience. Instead, the Court must look squarely at the challenged statute and ask whether Congress has sought to achieve its ends by taking property; if so, the statute must satisfy the Taking Clause. Any less rigorous approach allows the taking of property by "regulation," a legislative power whose appetite was known to be so truly voracious that the Framers banned its existence *via* the Taking Clause.

The role of this Court as the cornerstone institution of liberal democracy will become secure when the Court's decisions engender confidence that the growth of Government power at the expense of individual liberties is no longer inexorable. When the Court stands against the Government itself as the fearless defender of each of the freedoms held dear by the Framers of the Constitution, no room exists for doubt that the judiciary may serve primarily as an instrument of central government authority.[19] To achieve this end, the Court must produce courageous results as well as meaningful words, demonstrating for all to see that the high-water mark of human liberty under the Constitution was not reached in 1787, but is yet to be achieved in 1986 and beyond. Protection of political

---

[19] "[I]t is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community." *The Federalist* No. 78, at 399 (A. Hamilton) (London: J. M. Dent & Sons Ltd. 1911).

expression, religious beliefs, and the rights of the criminally accused will be necessary but insufficient for this purpose. If our self-government is to be continually successful, producing the added increments of wealth which are elemental ingredients of improved welfare for all members of society is essential.[20] To address that fundamental concern of liberal democracy, the Court's demonstration of commitment to the protection of individual rights must have meaning to those persons whose human dignity finds a primary means of expression through economic creativity and productivity.

II.

IF "WITHDRAWAL LIABILITY" IS INVALID UNDER THE TAKING CLAUSE, THE RELATED PROVISIONS OF THE MPPAA REQUIRING PAYMENT OF "PREMIUMS" TO PBGC ARE LIKEWISE INVALID AS INSEVERABLE FROM THE STRICKEN STATUTORY SCHEME.

In a specially mandated report to Congress in 1979, PBGC declared that the annual "premium" payable by multiemployer pension plans to PBGC might actually exceed $80.00 per employee participant under certain asumptions even after taking "employer liability" into account, unless its entire package of legislative proposals was adopted.[21] Congress eventually adopted those proposals substantially intact, including provisions for a staged increase of "premium" rates from $1.00 per employee annually to $2.60 per employee annually. 29 U.S.C. § 1306(a)(3)(A)(ii).

---

[20]M. Novak, *The Spirit of Democratic Capitalism, supra,* at 15-16, 202-205, 210, 273-285, 304-307, 357.

[21]PBGC Multiemployer's Study, required by P.L. 95-214, July 1, 1978, pp. 1, 2.

Thus, while a determination that "withdrawal liability" is invalid under the Taking Clause would necessarily delete entirely the provisions of Subchapter III, Subtitle E, Part 1 of ERISA [29 U.S.C. §§ 1381-1405] establishing "withdrawal liability," the question remains whether certain other closely related provisions of the statutory scheme must fall at the same time. This case presents the question whether the statutory requirement that "premiums" be paid to PBGC is enforceable if "withdrawal liability" has been stricken as constitutionally invalid.

In *I.N.S. v. Chadha,* ____ U.S. ____, 103 S.Ct. 2764, 2774 (1983), the Court declared that an unambiguous severability provision in the challenged statute "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether [a particular part] was invalid." In *Chadha,* the Immigration and Nationality Act contained a severability provision very similar to § 509 of ERISA [88 Stat. 895, 29 U.S.C. § 1139], which states:

> "If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

This provision was enacted in 1974, while "withdrawal liability" and the increased "premiums" were enacted in 1980 under the MPPAA, and no additional severability clause was included in the MPPAA. The 1980 statute was largely comprised of an amendment to ERISA, which gives rise to the potential for treating the 1974 severability clause as applicable to the 1980 legislation. However, if such an intent existed, Congress did not clearly express it.

What clearly should be conceded by PBGC is that Congress would have designed other provisions of the MPPAA (specifically, the "premium" provisions) very differently if "withdrawal liability" had not been included in the statutory scheme; *i.e.*, "... [Congress]would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976), quoted in *I.N.S. v. Chadha, supra,* ____ U.S. at ____, 103 S.Ct. at 2774. Undoubtedly, if "withdrawal liability" is nullified under the Taking Clause, Congress would prefer having the opportunity to begin anew by acting comprehensively to create a statute "fully operative as a law," *Chadha,* ____ U.S. at ____, 103 S.Ct. at 2775, rather than having the remaining financial provisions of the existing statute applied in a piecemeal fashion.

III

THE "PREMIUM" STATUTE ENACTED IN 1974 VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING LEGISLATIVE AUTHORITY TO PBGC.

Partly as a result of the complex and comprehensive nature of ERISA, Title IV of ERISA was enacted in 1974 after wholly insufficient prior study of multiemployer pension plans. In the entire legislative history of ERISA, the chief (and almost only) support for the premise that multiemployer plans were intended to be covered by Title IV was a brief, one-paragraph discussion contained in a staff report issued by the Senate Finance Committee to accompany Senate Bill 1179 on August 21, 1973. That discussion expressed the intent that a pension plan administered by a Taft-Hartley pension trust should "not be treated as a money purchase plan ..." because "the employers in the aggregate have a voice ... in the determination of the forms and levels of benefits ...." 1974 *U.S.*

Code Cong. & Admin. News, p. 4965. S.Rep. No. 93-383. This staff report apparently did not accompany the legislation sent to the Joint Conference Committee as H.R. 2, and the Joint Conference Report did not include an expression of the same intent. H.Conf.Rep. No. 93-1280 (Aug. 12, 1974). 3 *Legislative History of ERISA* 4251 (1976).

Despite the lack of prior study, Congress enacted a requirement that multiemployer plans pay "premiums" to PBGC, and authorized PBGC to use the funds collected "in its discretion" to pay benefits to participants of a terminated multiemployer plan if (a) the terminated plan had existed for five years; and (b) PBGC could determine that such payment of benefits would not "jeopardize the payments [PBGC] anticipates it may be required to make in connection with benefits guaranteed under this title with respect to multiemployer plans which terminate after December 31, 1977." ERISA § 4082(c)(2), 28 U.S.C. § 1381(c)(2), 88 Stat. 1035.

Of course, practically the entire universe of multiemployer pension plans had been in existence for more than five years in 1974, so the first condition is meaningless in most circumstances. And, as PBGC urgently reported to Congress in obtaining an emergency amendment of the effective date of mandatory coverage from January 1, 1978, to July 1, 1979 (Pub.L. 95-214, § 1, Dec. 19, 1977, 91 Stat. 1501], the enacted program of guaranteed benefits was completely unworkable and threatened not only to bankrupt PBGC if allowed to become effective, but also threatened highly uncertain and detrimental effects on the financial stability of multiemployer pension plans themselves. Under such ambiguous and dangerous circumstances, PBGC was disabled from determining rationally that any payment of benefits would not "jeopardize" future payments of enacted guarantees.

Nevertheless, PBGC did in fact determine to pay benefits to the participants of three terminated multiemployer plans, each such plan coincidentally being among the constituents of the chairman of the Senate Human Resources Committee (Mr. Williams of New Jersey), the ranking minority member of the committee (Mr. Javits of New York), or the chairman of the House Subcommittee on Labor-Management Relations (Mr. Thompson of New Jersey), each committee having jurisdiction over the enacted legislation.

Having no "intelligible principle" to control the use of funds, this statute is a forbidden delegation of legislative power. *Hampton & Co. v. U. S.*, 276 U.S. 394, 409, 48 S.Ct. 348, 352 (1928). Such "sharing" of legislative and administrative authority between PBGC and the responsible congressional committees does not comprise enactment of legislation "by the National Congress in [a] step-by-step, deliberate and deliberative process" as required by the Separation of Powers principle. *I.N.S. v. Chadha, supra,* 103 S.Ct. at 2788. Accordingly, the statute delegating such authority is void, and the closely related statute requiring payment of such funds by multiemployer plans to PBGC as "premiums" must fall together, since neither provision can be fully operative without the other. *Id.*, ____ U.S. at ____, 103 S.Ct. at 2774, 2775.

The Three Judge Court declined to reach this issue on grounds of mootness resulting from amendment of the statute, but the issue is by no means moot when the Trustees continue to contest the payment of "premiums" claimed by PBGC under the 1974 statute. In addition, the amended statute contains the same delegation of legislative authority with respect to expenditure of funds on behalf of plans terminated before August 1, 1980. 29 U.S.C. § 1461(c)(2), 94 Stat. 1267.

CONCLUSION

Based on the foregoing, the judgment should be reversed and the case remanded with instructions that judgment be entered on behalf of appellants as follows:

(a) Declaring Part I of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405, 94 Stat. 1217-1243], to be unconstitutional as a violation of the Taking Clause of the Fifth Amendment;

(b) Declaring Sections 4006, 4007 and 4082(c) of ERISA, as enacted in 1974 [29 U.S.C. §§ 1306, 1307, 1381(c), 88 Stat. 1010-1013, 1035], to be unconstitutional as a violation of the principle of Separation of Powers;

(c) Declaring Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii) 94 Stat. 1264-65], to be unconstitutional as inseverable from the provisions of ERISA declared to be in violation of the Taking Clause; and

(d) Granting a permanent injunction restraining appellee PBGC from enforcing the statutes declared to be invalid.

Dated: July, 1985.

Respectfully submitted,

WAYNE JETT*
JETT, CLIFFORD & LAQUER
Counsel for Appellants
Connolly, et al.
**Counsel of Record*